84-1255

No. .....

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In The
Supreme Court of the United States
October Term, 1984

ALPHA BETA COMPANY, CAROLE COLE AND LYNNE COPPIN,

Petitioners,

vs.

RITA NAHM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. May a state tort claim be maintained where the allegations therein are inextricably intertwined with a collective bargaining agreement such that in adjudicating the complaint the trial court will necessarily be required to interpret and apply a collective bargaining agreement containing a mandatory arbitration clause?

2. Is an employee excused from exhausting her contractual remedies under an exclusive and mandatory arbitration clause because she has terminated her employment?[1]

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[1] Petitioner Alpha Beta Company is a subsidiary of American Stores Company which is affiliated with the following companies: American Stores Realty Corp.; American Stores Properties, Inc.; American Stores Company (California); American Stores Dairy Co.; American Stores Management Systems Co.; A.S.C., Inc.; S.K.A., Inc.; Trans-West Air Service; Skaggs Alpha Beta, Inc.; Skaggs Companies, Inc.; Acme Markets, Inc.; and Jewel Companies, Inc. The following companies are wholly owned subsidiaries of Jewel Companies, Inc.: Jewel Food Stores; Osco Drugs; Eisner Food Stores; Buttrey Food Stores; Sav-On Drugs, Inc.; Star Market Company; White Hen Pantry; and The Park Corporation. All subsidiaries of Alpha Beta Company are wholly owned.

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Petitioners, Alpha Beta Company, Carole Cole and Lynne Coppin (hereinafter collectively referred to as "Alpha Beta") respectfully pray that a writ of certiorari issue to review a decision of the California Court of Appeal for the First Appellate District entered on October 16, 1984.

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CITATION TO OPINIONS BELOW

The decision of the California District Court of Appeal is officially reported at 160 Cal.App.3d 1049 and unofficially at 207 Cal.Rptr. 117. This Decision appears in Appendix "A", *infra* (App. 13). The decision of the California Supreme Court retransferring the case for hearing to the District Court of Appeal appears in Appendix "B", *infra,* (App. 14), and the decision of the California Supreme Court denying the Petition for Hearing appears in Appendix "C", *infra* (App. 15).

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JURISDICTION

The decision of the California District Court of Appeal was issued on October 16, 1984. A petition for rehearing was denied on November 14, 1984, and a petition for hearing to the California Supreme Court was denied on December 20, 1984. This Petition for Writ of Certiorari was filed within sixty days of that date, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 301 of the Labor-Management Relations Act (29 U.S.C. § 185) provides in relevant part as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The only constitutional provision implicated is the Supremacy Clause (Art. VI, cl. 2).

STATEMENT OF THE CASE

Contrary to the unanimous view of the federal courts, California permits a state tort claim to be maintained though each of the allegations upon which the Complaint is premised is arguably a breach of a collective bargaining agreement and though the plaintiff has failed to pursue her arbitral remedies. This Court is presently considering the extent to which an analogous state claim is preempted where the tort allegations are founded on the breach of a collective bargaining agreement and are "inextricably intertwined" with rights and obligations established by the contract. *Allis-Chalmers Corp. v. Lueck*, Case No. 83-1748, *cert. granted*, — U.S. —, 105 S.Ct. 80 (1984) (argued January 16, 1985).

A. The Facts.

Alpha Beta operates a chain of retail supermarkets. Respondent Rita Nahm (hereinafter "Nahm") was em-

ployed as a Bakery Clerk and covered by a collective bargaining agreement negotiated on her behalf by the United Food and Commercial Workers Union, Local 870. This collective bargaining agreement contained provisions governing discrimination, seniority, overtime, the right to transfer, the issuance of oral and written warnings, and all other conditions governing the terms of Nahm's employment with Alpha Beta. Any alleged violation of these contractual provisions, including the *arbitrability* of any grievance, was subject to a mandatory grievance and arbitration clause.[2]

Six months after voluntarily terminating her employment with Alpha Beta, respondent Nahm filed a Complaint in the California Superior Court alleging a single cause of action for intentional infliction of emotional distress. Each of the allegations upon which Nahm relies in support of this state tort claim is potentially a breach of the collective bargaining agreement. In this regard, Nahm's Complaint alleges *in toto:*

> "Commencing in approximately September of 1981, defendants above named and each of them, participated in episodes and encounters designed to harass, humiliate and upset plaintiff by, among other things, making rude and humiliating comments to and about plaintiff in front of customers and co-employees; decreasing her number of working hours below those of

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[2] The collective bargaining agreement provides in relevant part: "18.1 For the purpose of this Agreement, a grievance is a dispute, difference of opinion between the parties, and grievances of employees involving or arising out of the meaning, interpretation, application or alleged violation of this Agreement, *including the arbitrability of all such matters.* All grievances as defined are to be processed in accordance with the terms of this section." (Emphasis added.) (App. 3.)

other employees who had less or the same seniority as plaintiff; degrading her job performance in front of others; causing plaintiff to perform the job duties of others; asking plaintiff to stay on and work overtime and then verbally abusing and chastising her for doing so; making false statements in documents in plaintiff's personnel file to make it look as if plaintiff was being insubordinate to superiors; discriminating against plaintiff in favor of other employees; using foul and abusive language directed at plaintiff; refusing to honor plaintiff's request to be transferred to another store." (App. 2-3.)

Notwithstanding the contractual basis underlying each of these allegations, while employed, Nahm filed only one grievance against Alpha Beta. On February 27, 1982, Nahm was issued a written warning for insubordination. Nahm immediately filed a grievance contending that the warning was improper under the contract. A Board of Adjustment, as provided for by the collective bargaining agreement, was convened to adjudicate this grievance. The Board took evidence, heard argument, and "deadlocked" on the issue of whether the warning was proper. Neither Alpha Beta nor the Union chose to pursue the grievance further though the Union reserved the right to arbitrate the validity of the warning if Alpha Beta used it to support further disciplinary action against Nahm. It is the issuance of this warning upon which Nahm relies for the allegation that Alpha Beta made "false statements in [her] personnel file to make it look as if [she] was being insubordinate to superiors."

Though the Complaint, above-quoted, set forth numerous other potential violations of the collective bargaining agreement, no other grievance was ever filed by Nahm against Alpha Beta. Nahm *never* asserted that Alpha

Beta (1) denied her the right to transfer; (2) reduced her hours of work; (3) required her to do the work of others; (4) issued her an oral warning for working overtime; or (5) discriminated against her. Yet, each of these matters is covered by the collective bargaining agreement and any violation thereof is subject to the contractual arbitration procedure. (App. 3.)

B. Proceedings Below.

On September 21, 1983, in response to the Complaint, Alpha Beta moved for summary judgment on the defenses raised in its Answer asserting that the tort claim was preempted under federal law. (Appendix "D".) In support of its motion, Alpha Beta relied on the declaration of its Director of Labor Relations, with attached exhibits, and Nahm's answers to interrogatories. (App. 3-4.) Nahm filed only legal argument in opposition. *Id.* When the motion was denied without comment, Alpha Beta filed a Petition for Writ of Prohibition, or in the Alternative, Mandate with the California District Court of Appeal. On March 16, 1984, the Court of Appeal denied the petition without comment.

Alpha Beta then petitioned the California Supreme Court for a hearing. On April 19, 1984, the Supreme Court granted the petition and immediately retransferred the matter to the Court of Appeal with directions to issue an alternative writ citing *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425, 429 (9th Cir. 1983). (Appendix "B".)

After oral argument, the Court of Appeal issued the instant decision discharging the Alternative Writ and denying the petiton for a preemptory writ. (Appendix

"A".) The Court concedes that the extent to which the collective bargaining agreement was *"used or disregarded"* will have to be adjudicated in order to determine the validity of Nahm's tort allegations, but nonetheless concludes that the Complaint is not preempted. (App. 12-13.) The Court acknowledges that this finding would mandate preemption under a host of cases decided under the Railway Labor Act (45 U.S.C. § 151). (App. 5-7.) It distinguishes those cases on the ground that arbitration is statutorily provided for in the Railway Labor Act (RLA) while only a desirable method of resolving disputes under the Labor-Management Relations Act (LMRA).

The Court then concludes that the federal interest in requiring arbitration of these contractual disputes "can fairly be characterized as of peripheral concern to" federal law while "Nahm appears to have pleaded an orthodox case for recovery under California law for the tort of intentional infliction of emotional distress which is . . . a matter of legitimate local concern." (App. 10-11.) Finally, because Nahm is no longer employed by Alpha Beta, the Court excuses her admitted failure to exhaust her contractual remedies under the grievance procedure. (App. 13.)

On November 14, 1984, the District Court of Appeal denied Alpha Beta's Petition for Rehearing, and on December 20, 1984, the California Supreme Court denied Alpha Beta's petition for a hearing.

C. Finality of Decision.

The California District Court of Appeal's decision on the Section 301 preemption issue is the law of this case and final for the purposes of 28 U.S.C. § 1257. It "finally disposed of the federal preemption issue . . ." and the

decision is not subject to further state court review. *Belknap, Inc. v. Hale,* — U.S. —, 103 S.Ct. 3172 n. 5 (1983).

REASONS FOR GRANTING THE WRIT

A. Preemption Is Required Where A Tort Action Requires Adjudication Of A Collective Bargaining Agreement.

For a quarter of a century, rights created by a collective bargaining agreement have been governed by and enforceable exclusively under federal law, in particular Section 301 of the LMRA. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456 (1957). In conformity with stated Congressional policy (29 U.S.C. §173(d)), this Court has established private arbitration, where agreed upon, as the *exclusive* method for adjudicating disputes that arise under a collective bargaining agreement. *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); and *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965).

The application and interpretation of a collective bargaining agreement are at the core of Nahm's tort claim. The propriety of Alpha Beta's actions vis-a-vis Nahm can only be resolved by reference to the collective bargaining agreement. Did Alpha Beta deny Nahm a transfer; did Alpha Beta deny Nahm full-time work; did Alpha Beta improperly discipline Nahm? The answers to these and similar questions can only be found in the collective bargaining agreement.

Though Nahm's allegations are undisputably grievances under the agreement (App. 3), the District Court of Appeal concludes that arbitration of these grievances "can fairly be characterized as of peripheral concern to the LMRA." (App. 10.) In reaching this conclusion, the Court rejects the contrary result reached by every federal court which has considered the *identical* issue in the *identical* context.

Federal courts have been unanimous in holding that a tort action for intentional infliction of emotional distress is preempted where a collective bargaining agreement would necessarily have to be interpreted in adjudicating the tort complaint. *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984); *Moore v. General Motors Corp.*, 739 F.2d 311 (8th Cir. 1984); *Viestenz v. Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir.) *cert. den.* — U.S. —, 103 S.Ct. 303 (1982); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. den.* 439 U.S. 630; and *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983).

The preemption test was succinctly set forth by the Ninth Circuit in *Beers v. Southern Pacific Transportation Co., supra,* the case initially relied on by the California Supreme Court in retransferring the matter to the District Court of Appeal.

> "Beers argues that his tort claim for intentional infliction of emotional distress falls within this Farmer-Sears [430 U.S. 290 (1977) and 436 U.S. 180 (1978)] exception because his claim is not covered by any provision of the collective bargaining agreement, and, thus, because the remedy he seeks, money damages

> for emotional distress, is not covered by the labor contract or federal labor law, federal preemption is inapplicable. However, as stated in Sears, *the critical inquiry is whether the controversy (the harassments) was identical to or different from what could have been, but was not, presented to the NRAB (National Railroad Adjustment Board).* Beers' complaints referred to work conditions, disciplinary procedures, representation rights covered by or substantially related to the collective bargaining agreement. These complaints could have been brought before the NRAB. *State adjudication of the intentional emotional distress claim would have called for interpretation and examination of the collective bargaining agreement resulting in state intervention into the area of federal labor law."* (Emphasis added.) 703 F.2d at 429.

Clearly, *Beers* commands the conclusion that Nahm's Complaint is preempted. As in *Beers,* and as conceded by the District Court of Appeal, it is impossible to adjudicate Nahm's Complaint without resort to the collective bargaining agreement to ascertain whether Alpha Beta's actions were *required by* or *in contravention* of that agreement.

In point of fact, the District Court of Appeal expressly concedes that Nahm's Complaint would be preempted under the *Beers* analysis. (App. 5-7.) But, the Court rejects the applicability of *Beers, Magnuson,* and *Jackson* on the ground that those employers were subject to the RLA, not the LMRA, and arbitration under the RLA is required by statute. Not only has this distinction been rejected by this Court, but it ignores the Ninth Circuit's decision in *Olguin,* the Tenth Circuit's decision in *Viestenz,* and the Eighth Circuit's decision in *Moore,* all three of which apply the *Beers* analysis to LMRA employers.

Though provided for under the RLA, arbitration is equally exclusive for employers, employees, and unions governed by the LMRA. *Republic Steel Corp. v. Maddox, supra; Vaca v. Sipes,* 386 U.S. 171 (1967); and *United Steelworkers v. American Mfg. Co., supra.* The similarities between the RLA and the LMRA, and the identical policies underlying arbitration under both statutes, are so striking that this Court has often analogized cases decided under one statute to cases arising under the other. *E.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 383-384 (1969); and *Textile Workers Union v. Lincoln Mills, supra,* 353 U.S. at 458. The distinction proposed between the RLA and LMRA is simply meaningless. Under both statutes, arbitration is exclusive. Under both statutes, arbitration serves the same purpose—avoidance of industrial strife. Indeed, in *Beers* itself, the Ninth Circuit in construing the applicability of preemption under the RLA, looked "[f]or an analogy, and to determine national labor policy . . . " to the LMRA. 703 F.2d at 428.

It is no surprise, then, that the Ninth Circuit's analysis in *Beers* has been applied by that Circuit, as well as the Eighth and Tenth Circuits, to cases arising under the LMRA. *Olguin v. Inspiration Consolidated Copper Co., supra; Moore v. General Motors Corp., supra;* and *Viestenz v. Fleming Companies, Inc., supra.* (" . . . Although Mr. Magnuson's dispute grew out of an employment relationship under the Railway Labor Act, 45 U.S.C. §§ 151-188, the specific preemption principle at issue here is the same." 681 F.2d at 704, n. 4.)

This Court is presently considering the almost identical issue arising out of a decision of the Wisconsin Su-

preme Court. *Allis-Chalmers Corp. v. Lueck, cert. granted* — U.S. —, 105 S. Ct. 80 (1984) (argued January 16, 1985). In *Allis-Chalmers,* the Wisconsin Supreme Court refused to preempt a tort action premised on the bad faith of an employer in handling an insurance claim that arose under a collective bargaining agreement. The Wisconsin court rejected the preemption argument even though the merits of the complaint were ultimately based on an interpretation of the collective bargaining agreement. As in this case, the employee's failure to exhaust his contractual remedies under the arbitration provision was excused. Also, as in this case, the court used the preemption analysis of *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), and the exception set forth in *Farmer v. Carpenters,* 430 U.S. 290 (1977) to justify allowing the tort action to proceed.

But, *Garmon* deals with preemption under the National Labor Relations Act and whether conduct is arguably protected or prohibited by that Act. *Garmon* has little, if any, applicability to preemption under Section 301. *See Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 102, n. 9 (1962). The question here is not whether Nahm's allegations come within the jurisdiction of the National Labor Relations Board but rather whether state law may be applied to adjudicate a breach of a collective bargaining agreement.

Nor does the *Farmer* exception provide any shelter for Nahm's Complaint. In that case the claim for intentional infliction of emotional distress was permitted only because the allegations did not concern activity regulated by federal law. In *Farmer* itself the Court was careful to limit the exception to cases where the validity of the com-

plaint was not dependent on a "resolution of the 'merits' of the underlying labor dispute." 430 U.S. at 304. Thus this Court affirmed that part of the order dismissing those causes of action which were dependent on a judicial interpretation of the collective bargaining agreement. 430 U.S. at 303. Only the abusive manner in which the conduct occurred was subject to state jurisdiction.

Unlike the plaintiff in *Farmer,* Nahm does not complain about the manner in which she was required to work overtime, the manner in which she was given a written warning, or the manner in which she was denied a transfer; but rather complains about the decision (1) to require her to work overtime, (2) to deny her a transfer, and (3) to issue her a written warning. Each of these matters should have been resolved under the collective bargaining agreement.

That *Farmer* is inapplicable is demonstrated by the simple fact that every federal court in finding identical actions to be preempted has considered the *Farmer* exception and rejected it. (See cases cited *supra,* p. 8.) Undisputably, Nahm's Complaint is inextricably intertwined with the collective bargaining agreement and its grievance procedure. The District Court of Appeal is substituting judicial litigation for arbitration in contravention of well-established federal law. Such is not permitted where "the claimed state tort of outrage is intertwined with labor-management relations and activities subject to grievance under the collective bargaining agreement." *Olguin v. Inspiration Consolidated Copper, supra,* 740 F.2d 1468 at n. 9.

B. Exhaustion Of Contractual Remedies Was Required.

Though the District Court of Appeal concedes that the collective bargaining agreement is implicated and that Nahm could have pursued her remedies under that agreement, it excuses her failure to do so because her employment with Alpha Beta has terminated.

> "In terms of the policies underlying the exhaustion doctrine, it is too late in this case to hope for a simple, expeditious and yet adequate disposition of Nahm's complaints or 'to foster more harmonious employee-employer relations.' Nahm is no longer an employee, and the relief which might have been available to her, as an employee, by way of the arbitration procedure—correction of allegedly improper entries in her personnel file, for example—would be all but meaningless, to her or to the labor-management relationship at Alpha Beta, now." (App. 13.)

It is unbelievable that after twenty years of developed labor law, the Court of Appeal could create an exception expressly rejected by this Court. The very case establishing the exhaustion doctrine, *Republic Steel Corp. v. Maddox, supra,* involved an employee who had left his employment more than three years prior to initiating suit. Focusing on the harm to the management-union relationship, this Court required exhaustion. " . . . [T]here can be no doubt that the employee must afford the union the opportunity to act on his behalf." 379 U.S. at 653. *See generally* Morris, *The Developing Labor Law,* (2nd Ed. 1983), pp. 1294-1299.

Similarly, the resolution of Nahm's complaints will have a serious impact on other Alpha Beta employees. Whether Alpha Beta has a right to require overtime, issue written warnings, deny transfers, is a matter of continuing

and vital interest to thousands of employees working for Alpha Beta. By focusing on Nahm alone, the Court of Appeal loses sight of the important role arbitration plays in preserving stable labor-management relations. The exhaustion doctrine insures that a disgruntled employee cannot disrupt that relationship without first attempting to resolve any dispute within the framework provided for by the parties.

It is almost too obvious to state that the federal courts have uniformly followed *Republic Steel* and required exhaustion prior to permitting an employee to pursue judicial relief even where the employment relationship has terminated. *E.g., Moore v. General Motors Corp, supra,* 739 F.2d at 317; *Fristoe v. Reynolds Metals Co.,* 615 F.2d 1209, 1214 (9th Cir. 1980); *Viestenz v. Fleming Companies, supra,* 681 F.2d at 701. The exception created for Nahm would swallow the exhaustion rule. In every case in which the employment relationship has terminated, the Court's rationale would permit an employee to avoid arbitration. The exception cannot be left to stand.

C. California Has Established A Rule Which Undercuts National Labor Policy And Demands Review By This Court.

A central aim of federal labor policy is to ensure industrial peace and stability by establishing a uniform law governing the application and interpretation of collective bargaining agreements. *Teamsters v. Lucas Flour Co., supra,* 369 U.S. at 103; *see also Smith v. Evening News Assn.,* 371 U.S. 195, 200-201 (1962). By choosing to apply state law to a breach of a collective bargaining agreement, California has established a rule of law which

undermines the nationwide scheme for administration of management-union affairs. Every contract breach can be recast in tort terms. If artful pleading is sufficient to avoid the application of federal law, the uniformity of that law will soon disappear. The critical inquiry is not whether California seeks to enforce a law of general application but whether by doing so it will infringe on an area of federal concern. *Sears Roebuck & Co. v. Carpenters,* 436 U.S. 180, 197 (1978).

Arbitration's vital role in the resolution of labor disputes will vanish if an employee can so easily circumvent this contractual machinery. It is the exclusivity of arbitration, as well as its efficiency, which makes it so desirable as an alternative to judicial litigation. This decision will have a "crippling effect" on arbitration by sanctioning its circumvention. *Cf. United Steelworkers v. American Mfg. Co.,* 363 U.S. at 566.

There is nothing to commend in this decision. California, in essence, establishes its own policy as to when it will honor collective bargaining agreements. The District Court of Appeal places collective bargaining agreements, their interpretation and administration, in serious jeopardy. "The possibility that individual contract terms might have different meanings under state and federal laws would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters v. Lucas Flour Co., supra,* 369 U.S. at 103. Every principle upon which the decision rests has been repeatedly and pointedly rejected by this Court and all other federal courts.

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CONCLUSION

California has established a rule which would permit an ex-employee to maintain a state tort claim based on grievances which arise under a collective bargaining agreement and which are subject to an exclusive arbitration procedure. Federal law prohibits this intrusion, and the Complaint is necessarily preempted. For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

DATED: February 5, 1985

Respectfully submitted,

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Alpha Beta Company,
Carole Cole and Lynne Coppin

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

A025458

Alameda Co.
Super.Ct.No. H-85473-9
(Filed October 16, 1984)

ALPHA BETA INC. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ALAMEDA,

Respondent,

RITA NAHM,

Real Party in Interest.

Rita Nahm was employed by Alpha Beta, Inc., from May 1980 through February 1982, and throughout that period was subject to a collective bargaining agreement between Local 870, Retail Clerks Union AFL-CIO, and Alpha Beta. Several months after her employment terminated Nahm sued Alpha Beta and its supervisory employees Cole and Coppin. in respondent superior court, for damages for intentional infliction of emotional distress. Defendants moved for summary judgment upon

the theory that Nahm's tort action in respondent court was preempted by federal labor law. Respondent court denied defendants' motion; defendants petitioned this court for a writ of prohibition or mandate; we summarily denied the petition. The Supreme Court granted hearing and retransferred the matter to us with directions to issue an alternative writ, referring to *Beers v. Southern Pacific Transp. Co.* (9th Cir. 1983) 703 F.2d 425. We issued the alternative writ, and the matter has been argued and submitted to us for decision. We conclude that respondent court's order was correct. Accordingly we vacate the alternative writ and deny the peremptory writ.

Nahm's complaint in respondent court alleged in pertinent part that "[a]t all times herein mentioned, defendant . . . COLE was the assistant store manager of the above mentioned Alpha Beta store. At all times herein mentioned, defendant . . . COPPIN was the manager of the bakery of the above mentioned Alpha Beta store. Commencing in approximately September of 1981, defendants above named and each of them, participated in episodes and encounters designed to harass, humiliate and upset plaintiff by, among other things, making rude and humiliating comments to and about plaintiff in front of customers and co-employees; decreasing her number of working hours below those of other employees who had less or the same seniority as plaintiff; degrading her job performance in front of others; causing plaintiff to perform the job duties of others; asking plaintiff to stay on and work overtime and then verbally abusing and chastising her for doing so; making false statements in documents in plaintiff's personnel file to make it look as if plaintiff was being insubordinate to superiors; discriminating against

plaintiff in favor of other employees; using foul and abusive language directed at plaintiff; refusing to honor plaintiff's request to be transferred to another store." The complaint further alleges that each defendant acted in all relevant respects as the agent of each other defendant, and that the described conduct was "outrageous" and caused Nahm emotional injury for which she is entitled to both compensatory and punitive damages.

There is no indication in the record before us that Nahm's allegations are in any way related to the termination of her employment.

Defendants moved for summary judgment on the sole ground "that the Complaint herein fails to state a cause of action against defendants in that it is preempted by federal law." In support of their motion defendants placed before the court the collective bargaining agreement, calling attention to its provision for processing "grievances" by voluntary adjustment or arbitration. The collective bargaining agreement defines a "grievance" as "a dispute, difference of opinion between the parties, and grievance of employees involving or arising out of the meaning, interpretation, application or alleged violation of this Agreement, including the arbitrability of all such matters." By the declaration of Alpha Beta's director of industrial relations defendants asserted that "[e]ach and every one of these incidents could have been the subject of a grievance and processed through the grievance and arbitration procedure contained in . . . the collective bargaining agreement." Thus, defendants argued, "plaintiff's complaint is preempted by federal law in that the allegations therein constitute a single claim for breach of a collective bargaining agreement, the exclusive remedy for which is the

grievance and arbitration provision contained in said agreement."

Nahm filed only legal argument in opposition. Respondent court denied defendants' motion. This writ petition followed. The only issue before this court is whether defendants' uncontradicted showing is sufficient to demonstrate as a matter of law that Nahm's claim cannot be maintained in a California trial court at this time. (Cf. *LaRosa v. Superior Court* (1981) 122 Cal.App.3d 741, 744-745.)

Defendants identify two "questions presented for review":

"1. Does federal law preempt a state tort claim based on allegations identical to grievable events under a collective bargaining agreement.

"2. Can a state tort claim be maintained where in adjudicating the complaint the trial court will necessarily be required to interpret and apply a collective bargaining agreement?"

As stated and argued by defendants, these questions compound elements of two doctrines: Federal preemption (cf. *San Diego Unions v. Garmon* (1969) 359 U.S. 236, 242, 243; *Sarro v. Retail Store Employees Union* (1984) 155 Cal.App.3d 206, 214-216) and exhaustion of contractual arbitration procedures (*Johnson v. Hydraulic Research & Mfg. Co.* (1977) 70 Cal.App.3rd 675, 679; cf. Labor Management Relations Act § 203(d) (29 U.S.C. § 173, subd. (d)); *Steelworkers v. American Mfg. Co.*, (1960) 363 U.S. 564, 568).

We conclude that defendants' reliance on the rhetoric of federal preemption decisions is misplaced.

Defendants cite several cases decided under the Railway Labor Act (RLA) (45 U.S.C. § 151 et seq.). But to the extent that this action is affected at all by federal labor law, it is subject not to the RLA but rather to the general provisions of the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA) (29 U.S.C. § 141 et seq.).

The RLA expressly provides for administrative determination of disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . . " (45 U.S.C. § 153, subd. *First*(i).) It is now well established that these procedures are compulsory, and exclusive of judicial proceedings, in any dispute subject to the RLA. (*Andrews v. Louisville & Nashville R. Co.* (1972) 406 U.S. 320, 322-326; *Magnuson v. Burlington Northern, Inc.* (9th Cir. 1978) 576 F.2d 1367, 1369-1370.) "[T]he compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself . . . . " (*Andrews v. Louisville & Nashville R. Co., supra,* 406 U.S. 320, 323). Our attention has been directed by our Supreme Court to *Beers v. Southern Pacific Transp. Co., supra,* which we had rejected as inapplicable to this case when we summarily denied defendants' petition. Beers, employed under the terms of a collective bargaining agreement subject to the RLA, was discharged for alleged insubordination arising out of union activities. His state-court action for intentional infliction of emotional distress and violations of his rights under the RLA was removed to federal district court where summary judg-

ment for defendants was granted on the ground that the court lacked subject-matter jurisdiction. The Court of Appeals affirmed the district court's finding that the controversy was "a minor dispute within the exclusive province of the grievance mechanisms of the Railway Labor Act" (703 F.2d at p. 429), relying on *Magnuson v. Burlington Northern, Inc., supra,* which in turn followed *Andrews v. Louisville & Nashville R. Co., supra.*

The NLRA and LMRA contain no provision directly comparable to "the exclusive . . . grievance mechanisms" of the RLA. Section 203(d) of the LMRA (29 U.S.C. § 173, subd. (d)) does provide that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement," and the declaration that arbitration of grievances is "the very heart of the system of industrial self-government" (*Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 581) has been often reaffirmed. But "the difference between the impact of the NLRA and the RLA has significance. The focus of the NLRA is on specific conduct that Congress has deemed subject to either prohibition or protection, 29 U.S.C. §§ 157-158. Often . . . it is the objective of certain conduct, rather than the mere exercise thereof, that is relevant to determining whether actions are protected or prohibited by the NLRA. In contrast, the RLA has made *any* grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies contained in that Act . . . . It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than

under the NLRA." (*Jackson v. Consolidated Rail Corp.* (7th Cir. 1983) 717 F.2d 1045, 1052; cf. also *Andrews v. Louisville & Nashville R. Co., supra,* 406 U.S. 320, 323.) This distinction is historically explicable: The RLA provisions for mandatory administrative processing of minor disputes were part of a mechanism "designed to serve the stated purposes of the Act which were, among others: 'To avoid any interruption to commerce or to the operation of any carrier engaged therein' . . . . " (*Machinists v. Central Airlines* (1963) 372 U.S. 682, 687-689; cf. also *Majors v. U. S. Air, Inc.* (D. Md. 1981) 525 F.Supp. 853, 855 ("[o]ne of the primary purposes of the Act is to minimize interruptions in the nation's transportation services by strikes and labor disputes".) No similar perceived need for swift determination of minor disputes has been associated with the NLRA or LMRA.

In sum defendants' RLA cases, in general, and *Beers v. Southern Pacific Transportation Co., supra,* are not dispositive in the circumstances of record here.

Nor do defendants make a persuasive case for preemption under the leading judicial decisions in the NLRA/LMRA context. Most such decisions involved attempts in state courts to assert claims based upon alleged conduct which would constitute a violation of NLRA section 7 or an unfair labor practice under NLRA section 8. The basic principles were spelled out in *San Diego Unions v. Garmon, supra,* 359 U.S. 236: "[C]ongress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . . . [¶] When the exercise of state

power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. [Fn. omitted.] However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. [Citation.] Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act. [Fn. omitted.] [¶] When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 . . . . or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. . . . . [¶] . . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (359 U.S. at pp. 242-245.)

The limits of *Garmon's* preemption rule were further explored in *Farmer v. Carpenters* (1977) 430 U.S. 290. Farmer's decedent, Hill, had been an officer of the car-

penters union local. He sued the union on various theories including intentional infliction of emotional distress. The California superior court permitted the emotional distress count to go to the jury, which awarded actual and punitive damages. A Court of Appeal reversed on the ground of preemption, holding "that the state courts had no jurisdiction over the complaint since the 'crux' of the action concerned employment relations and involved conduct arguably subject to the jurisdiction of the National Labor Relations Board." (430 U.S. at p. 295.) The California Supreme Court denied hearing, but the United States Supreme Court granted certiorari, vacated the judgment, and remanded, concluding in relevant part that Hill's claim was not preempted. The United States Supreme Court reiterated *Garmon's* qualifications to the preemption rule for matters of "merely peripheral concern" and matters sufficiently "deeply rooted in local feeling" and added that "[w]e also have refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.' [Citations.]" (430 U.S. at pp. 296-297.)

Applying these principles to Hill's claim, the United States Supreme Court noted that "there is no federal protection for conduct on the part of union officers which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it,'" and that California, "on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition

because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury . . . . " (430 U.S. at p. 302.) "Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress. [Citations.] The state court need not consider much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities [in violation of NLRA §8(b)]." (430 U.S. at p. 304.) The United States Supreme Court then qualified its position: "Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. . . . Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." (430 U.S. at p. 305.)

These principles appear to be applicable to Nahm's claim against defendants. The question whether Nahm's damage claims, asserted after her employment has terminated for reasons apparently unrelated to the claims, should be arbitrated under the collective bargaining agreement can fairly be characterized as of peripheral concern to the LMRA. No protected activity or unfair labor practice is implicated. Because Nahm's employment has terminated the value to her of remedies available through the arbitration process is problematic at best; to force arbitration in this case could advance the policy goals of fed-

eral labor law in only the most abstract sense. At the same time, Nahm appears to have pleaded an orthodox case for recovery under California law for the tort of intentional infliction of emotional distress which is, as the United States Supreme Court recognized in *Farmer*, a matter of legitimate local concern. (Cf., e.g., *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 497-498.)

We conclude that the preemption doctrine as stated in *Garmon* and qualified in *Farmer* does not bar state court action under the circumstances of the record before us.

The remaining question is whether Nahm was required to exhaust remedies under the grievance-arbitration provisions of the collective bargaining agreement before she could bring her action in superior court.

"It is well established that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust the internal remedies before resorting to the courts in the absence of facts excusing such exhaustion. [Citations.] [¶] . . . '[T]his rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts [citation], is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. [Citation.] The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer re-

lations. [Citation.] Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies.'" (*Johnson v. Hydraulic Research & Mfg. Co., supra,* 70 Cal.App.3d 675, 679-680.) This California rule is consistent with the strong federal policy in favor of arbitration of labor disputes under existing collective bargaining agreements. (Cf. e.g., *Steelworkers v. American Mfg. Co., supra,* 363 U.S. 564, 568; *Steelworkers v. Warrior & Gulf Co., supra,* 363 U.S. 574, 581; *Republic Steel v. Maddox* (1965) 379 U.S. 650, 652-653.)

Defendants contend that every one of Nahm's allegations "arguably constitutes a breach of the collective bargaining agreement" and therefore that respondent court "will be forced to interpret the collective bargaining agreement .... Thus, the allegations contained in the complaint are inextricably intertwined with the collective bargaining agreement." "Nahm has chosen to disguise her dissatisfaction with the collective bargaining agreement as an action for intentional infliction of emotional distress. In truth, her complaint is an all-out assault on the collective bargaining process and arbitration of employment disputes."

If valid these contentions would tend to satisfy the exhaustion doctrine's requirement that the dispute be within the scope of the contract. But the contentions impermissibly distort Nahm's complaint which, in our view, plainly alleges a course of conduct intentionally undertaken for the purpose of inflicting emotional distress upon Nahm. Undeniably the collective bargaining agreement will be implicated, but only as it may have been used or

disregarded in the course of the alleged "episodes and encounters designed to harass, humiliate and upset plaintiff." This is not a situation in which (as in cases on which defendants rely) a plaintiff has by "artful pleading" undertaken to disguise an alleged wrongful discharge or other direct violation of a collective bargaining agreement in tort rhetoric. This is a legitimate tort complaint. In terms of the policies underlying the exhaustion doctrine, it is too late in this case to hope for a simple, expeditious and yet adequate disposition of Nahm's complaints or "to foster more harmonious employee-employer relations." Nahm is no longer an employee, and the relief which might have been available to her, as an employee, by way of the arbitration procedure—correction of allegedly improper entries in her personnel file, for example—would be all but meaningless, to her or to the labor-management relationship at Alpha Beta, now.

We conclude that the elements of the exhaustion doctrine have not been demonstrated and that, in any event, the doctrine is inappropriate to the circumstances of record.

The alternative writ of mandate is discharged. The petition for a peremptory writ of mandate is denied.

King, J.

We concur:

Low, P.J.

Haning, J.

AO25458

APPENDIX E

1/5 No. AO25458

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

ALPHA BETA, INC., ET AL.

Petitioner

v.

THE SUPERIOR COURT OF THE
COUNTY OF ALAMEDA,

Respondent;

NAHM, Real Party in Interest
(Filed April 19, 1984)

Petition for hearing GRANTED and matter transferred to this court and retransferred to the Court of Appeal, First Appellate District, Division Five, with directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar. (See Beers v. Southern Pacific Transportation Company (9th Cir. 1983) 703 F.2nd 425, 429.)

Chief Justice
KAUS

Justice
BROUSSARD

Justice
REYNOSO

Justice
GRODIN

Justice
LUCAS

Justice

Justice

APPENDIX C

1-1835

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

December 20, 1984

I have this day filed Order

HEARING DENIED

In re: 1 CIV. *No.* AO25458 ALPHA BETA, INC. et al.,

VS.

THE SUPERIOR COURT, ALAMEDA (RITA NAHM)

Respectfully,

Clerk

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA

HAYWARD DISTRICT

Case No. H-85473-9

DEFENDANT ALPHA BETA COMPANY'S ANSWER TO COMPLAINT FOR DAMAGES

RITA NAHM,

Plaintiff,

vs.

ALPHA BETA, INC., a corporation; CAROL COLE; LYNN COPPIN; and DOES 1 through 100,

Defendants.

COMES NOW, defendant ALPHA BETA COMPANY, improperly sued as Alpha Beta, Inc., (hereinafter "ALPHA BETA"), for itself and itself alone, and answering the Complaint on file herein, admits, denies and alleges as follows:

• • •

SECOND AFFIRMATIVE DEFENSE

I

At all times material herein, plantiff RITA NAHM was and is subject to a collective bargaining agreement negotiated on her behalf by United Food & Commercial

Workers Union, Local 870, her exclusive bargaining representative.

II

Said collective bargaining agreement sets forth the terms and conditions of employment and contains a grievance and arbitration provision which provides that any dispute which may arise under the collective bargaining agreement may be submitted to final and binding arbitration.

III

Plaintiff RITA NAHM has never invoked the use of said grievance and arbitration provision and has never requested that any dispute she may now have with defendant ALPHA BETA be submitted to arbitration.

IV

Said grievance and arbitration procedure is plaintiff's sole and exclusive remedy for any breach of the collective bargaining agreement.

THIRD AFFIRMATIVE DEFENSE

I

Defendant ALPHA BETA refers to Paragraphs I, II, III and IV of its Second Affirmative Defense and incorporates them by reference as though fully set forth herein.

II

Plaintiff RITA NAHM may not seek judicial relief until she has exhausted her contractual remedies.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff RITA NAHM's state law cause of action is preempted by federal law.

FIFTH AFFIRMATIVE DEFENSE

At all times material herein, defendant ALPHA BETA's conduct was privileged as a result of the employment relationship that existed between ALPHA BETA and plaintiff RITA NAHM.

WHEREFORE, defendant ALPHA BETA prays for judgment against plaintiff as follows:

1. That the Complaint be dismissed in its entirety;

2. For attorney's fees and costs of suit herein; and

3. For such further relief as the Court deems just and proper.

DATED: October 28, 1982.

McLAUGHLIN AND IRVIN

By /s/ Henry F. Telfeian

Attorneys for Defendant
Alpha Beta Company